No. 13339.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT NORBERT GALVAN,

Appellant,

vs.

U. L. PRESS, Officer in Charge, Immigration and Naturalization Service, United States Department of Justice, San Diego, California,

Appellee.

BRIEF FOR APPELLEE.

WALTER S. BINNS,
United States Attorney,

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division,

ROBERT K. GREAN,
Assistant U. S. Attorney,

600 Federal Building,
Los Angeles 12, California,

Attorneys for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Statutes

Textbooks

No. 13339.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT NORBERT GALVAN,

Appellant,

vs.

U. L. PRESS, Officer in Charge, Immigration and Naturalization Service, United States Department of Justice, San Diego, California,

Appellee.

BRIEF FOR APPELLEE.

Jurisdiction.

The District Court had jurisdiction of the action under Title 28, U. S. C. A., Section 2241, the appellant having filed a petition for a writ of habeas corpus in the United States District Court, in and for the Southern District of California, Southern Division, after hearings before the Immigration and Naturalization Service resulted in a warrant of deportation being issued against him.

The writ was denied and appellant was remanded to custody. This Court has jurisdiction of the appeal under the provisions of Title 28, U. S. C. A., Section 2253, there being no dispute as to the finality of the order denying the writ of habeas corpus.

Statutes Involved.

Sections 137, 137-3 and 155 of Title 8, U. S. C. A., provide, in pertinent parts, as follows:

"§137. Same; subversive aliens

Any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

* * *

(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

* * *

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt;

* * *"

"§137-3. Deportation of subversive aliens

(a) Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in * * * section 137(2) of this title, shall, upon the warrant of the Attorney General, be taken into

custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in sections 137 to 137-8 of this title, irrespective of the time of their entry into the United States.

* * *"

"§155. Deportation of undesirable aliens generally * * * In every case where any person is ordered deported from the United States under the provisions of this chapter, or of any law or treaty, the decision of the Attorney General shall be final.

* * *"

Statement of Facts.

Appellant is a native and national of Mexico, born in that country on June 6, 1911 [C. T. 174]. He first came to the United States on March 13, 1918, entering this country at El Paso, Texas, and he alleges continuous residence in this country since that time [C. T. 174, 175].

A warrant for the arrest of the plaintiff in deportation proceedings was issued on August 13, 1948, by authority of the Attorney General. The warrant of arrest recited in substance that evidence submitted indicated the alien was subject to deportation under 8 U. S. C. 137, as a member of a group working for the overthrow of the Government of the United States by force and violence. Hearings were conducted on the warrant of arrest on March 10, 1949 [C. T. 68] and on January 12, 1950 [C. T. 77], respectively, to give the alien an opportunity to show cause why he should not be deported.

These hearings were vitiated by the decision of the Supreme Court in the case of *Sung v. McGrath*, 339 U. S. 33, which held that the Administrative Procedure Act was applicable to deportation proceedings. Thereafter, Congress, on September 27, 1950, exempted deportation proceedings from the applicable provisions of the Administrative Procedure Act by the enactment of Public Law No. 843, 81st Congress, Second Session (8 U. S. C. A. 155a), which states:

> "Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of Sections 5, 7 and 8 of the Administrative Procedure Act (5 USC 1004, 1006, 1007)."

On December 12, 1950, the alien was given a *de novo* hearing on the aforesaid warrant of arrest [C. T. 33]. The record of hearing included evidence of admissions by the alien, on March 17, 1948, and on March 31, 1948, that he was a member of the Communist Party of the United States from about 1944 to 1946, that he had attended about ten or twenty meetings of that organization, and that his last attendance at a meeting had been about January, 1947 [C. T. 178, 179, 185, 186, 188].

This hearing on December 12, 1950, resulted in a warrant of deportation issued on October 30, 1951, by authority of the Attorney General, directing that the alien be deported to Mexico on the ground that he had been, after entry, a member of the Communist Party of the United States, and therefore deportable under 8 U. S. C. 137,

as amended by the Internal Security Act of 1950 [C. T. 33-67]. The alien was taken into custody on December 17, 1951, for execution of the warrant of deportation and the writ proceedings followed.

Points Raised by Appellant.

1. Appellant raises for the first time on appeal the constitutionality of the Act of October 16, 1918, as amended by the Internal Security Act of 1950 (8 U. S. C. A. 137, 137(2)(C) and 137-3(a)).

2. Appellant urges, contrary to the finding of the District Court that there was *substantial* evidence to support the warrant of deportation [C. T. 14], that there is insufficient evidence to sustain the warrant of deportation.

3. Appellant contends, contrary to the findings of the District Court that said hearing was fair [C. T. 14], that the appellant was not given a fair and impartial hearing.

4. Appellant contends, contrary to the finding of the District Court that there were no procedural irregularities in said hearing [C. T. 14], that procedure was not followed as required by law and that the administrative hearing was not legally conducted.

ARGUMENT.

I.

Constitutionality.

Appellant, on page 4 of his brief, admits the power of Congress to expel aliens and agrees that the Supreme Court, in *Harisiades v. Shaughnessy,* 342 U. S. 580, has determined that the Act does not contravene the provisions of Article I, Section 9, of the Constitution forbidding *ex post facto* laws. He contends, however, that said Act (Immigration Act of October 16, 1918, as amended by the Internal Security Act of 1950) is invalid under the Due Process clause of the Fifth Amendment, in that this Act made mere membership in the Communist Party of the United States specifically a basis for deportation and eliminated the necessity of proof that the Communist Party of the United States is an organization that believes in, advises, advocates or teaches the overthrow by force or violence of the Government.

Appellee believes that this contention of the appellant can be answered by the statement of Mr. Justice Jackson, on page 593 of *Harisiades v. Shaughnessy, supra,* wherein he states:

> "During all the years since 1920 Congress has maintained a standing admonition to aliens, on pain of deportation, not to become members of any organization that advocates overthrow of the United States Government by force and violence, a category repeatedly held to include the Communist Party. These aliens violated that prohibition and incurred liability to deportation. They were not caught unawares by a change of law. There can be no contention that they were not adequately forewarned both that their conduct was prohibited and of its consequences."

While the *Harisiades* case was not concerned with the Immigration Act of October 16, 1918, as amended by the Internal Security Act of 1950, it was concerned with the Act as it existed before the 1950 Amendment. The problem is directly treated in the Opinion of Mr. Justice Reed in the recently decided case of *Carlson v. Landon,* an appeal from the Ninth Circuit, 342 U. S. 524, wherein he states at page 534:

> "The basis for the deportation of presently undesirable aliens resident in the United States is not questioned and requires no reexamination. * * * So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders.[18]
>
> Changes in world politics and in our internal economy bring legislative adjustments affecting the rights of various classes of aliens to admission and deportation.[19] The passage of the Internal Security Act of 1950 marked such a change of attitude toward alien members of the Communist Party of the United States. Theretofore there was a provision for the deportation of alien anarchists and other aliens, who are or were members of organizations devoted to the overthrow by force and violence of the Government of the United States, but the Internal Se-

---

[18]*Nishimura Ekiu v. United States,* 142 U. S. 651, 659; *Fong Yue Ting v. United States,* 149 U. S. 698, 707; *Bugajewitz v. Adams,* 228 U. S. 585; *Ng Fung Ho v. White,* 259 U. S. 276, 280; *United States v. Curtiss-Wright Export Corp.,* 299 U. S. 304, 318; *Eichenlaub v. Shaughnessy,* 338 U. S. 521, 528; III Hackworth's Digest of International Law 725 (1942).

[19]* * *

curity Act made Communist membership alone of aliens a sufficient ground for deportation.[20] The reasons for the exercise of power are summarized in Title I of the Internal Security Act. It is sufficient here to print §2(15).[21] We have no doubt that the doctrines and practices of Communism clearly enough teach the use of force to achieve political control to give constitutional basis, according to any theory of reasonableness or arbitrariness, for Congress to expel known alien Communists under its power to regulate the exclusion, admission and expulsion of aliens.[22] Congress had before it evidence of resident aliens' leadership in Communist domestic activities sufficient to furnish reasonable ground for

---

[20]See note 4, *supra*. The extension of the proscription of residence to aliens believing in the overthrow of Government by force or violence has been progressive, as can be readily observed by following the successive enactments of laws to regulate the residence of aliens since the Act of February 5, 1917, 39 Stat. 874. See 8 U. S. C. §§137 and 155.

[21]"(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States."

[22]* * *

action against alien resident Communists. The bar against the admission of Communists cannot be differentiated as a matter of power from that against anarchists upheld unanimously half a century ago in the exclusion of Turner.[23] Since '[i]t is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful,'[24] the fact that petitioners, and respondent Zydok, were made deportable after entry is immaterial. They are deported for what they are now, not for what they were.[25] Otherwise, when an alien once legally became a denizen of this country he could not be deported for any reason of which he had not been forewarned at the time of entry. Mankind is not vouchsafed sufficient foresight to justify requiring a country to permit its continuous occupation in peace or war by legally admitted aliens, even though they never violate the laws in effect at their entry. The protection of citizenship is open to those who qualify for its privileges. The lack of a clause in the Constitution specifically empowering such action has never been held to render Congress impotent to deal as a sovereign with resident aliens.[26]"

Of great interest is the further statement of Mr. Justice Jackson in the *Harisiades* case, *supra,* at page 593, in which he states:

"In 1939, this Court decided *Kessler v. Strecker,* 307 U. S. 22, in which it was held that Congress, in the statute as it then stood, had not clearly expressed an intent that Communist Party membership re-

---

23* * *

24* * *

25* * *

26* * *

mained cause for deportation after it ceased.[20] The Court concluded that in the absence of such expression only contemporaneous membership would authorize deportation.

The reaction of the Communist Party was to drop aliens from membership, at least in form, in order to immunize them from the consequences of their party membership.

The reaction of Congress was that the Court had misunderstood its legislation. In the Act here before us it supplied unmistakable language that past violators of its prohibitions continued to be deportable in spite of resignation or expulsion from the party. It regarded the fact that an alien defied our laws to join the Communist Party as an indication that he had developed little comprehension of the principles or practice of representative government or else was unwilling to abide by them."

Thus, whatever the holding of *Bridges v. Wixon,* 326 U. S. 135, and *Schneiderman v. United States,* 326 U. S. 118, as cited by the appellant, "the reaction of Congress was that the Court had misunderstood its legislation."

There can be no misunderstanding that the present legislation and the Supreme Court, in *Carlson v. Landon, supra,* wherein it states, at page 535:

> "* * * but the Internal Security Act made Communist membership alone of aliens a sufficient ground for deportation"

found no fault with said legislation, and point out the successive enactment of laws to regulate the residence of aliens since the original Act of February 5, 1917.

20* * *

A possible claim of hardship is treated by the Court at pages 590 and 591 in the case of *Harisiades v. Shaughnessy, supra,* wherein the Court states:

> "We are urged, because the policy inflicts severe and undoubted hardship on affected individuals, to find a restraint in the Due Process Clause. But the Due Process Clause does not shield the citizen from conscription and the consequent calamity of being separated from family, friends, home and business while he is transported to foreign lands to stem the tide of Communism. If Communist aggression creates such hardships for loyal citizens, it is hard to find justification for holding that the Constitution requires that its hardships must be spared the Communist alien. When citizens raised the Constitution as a shield against expulsion from their homes and places of business, the Court refused to find hardship a cause for judicial intervention.[17]
>
> We think that, in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government's power of deportation. However desirable world-wide amelioration of the lot of aliens, we think it is peculiarly a subject for international diplomacy. It should not be initiated by judicial decision which can only deprive our own Government of a power of defense and reprisal without obtaining for American citizens abroad any reciprocal privileges or immunities. Reform in this field must be entrusted to the branches of the Government in control of our international relations and treaty-making powers.
>
> We hold that the Act is not invalid under the Due Process Clause. * * *"

17* * *

To conclude appellee's argument, directed to appellant's constitutional attack concerning Due Process, a quotation from the Opinion of Circuit Judge Swan, in *United States ex rel. Harisiades v. Shaughnessy,* 187 F. 2d 137, at page 141, simplifies the entire argument.

> "* * * A sovereign may exclude aliens altogether or may admit them on such terms as it chooses to impose. While an alien is allowed to remain here he is accorded certain constitutional protections but his license to remain is revocable at the sovereign's will; thereafter with respect to deportation *he is entitled only to 'procedural due process,' that is, that he be given notice of the hearing and opportunity to show that he does not come within the classification of aliens whose deportation Congress has directed.*[12] So far as we can discover none of the later decisions of the Supreme Court casts any doubt upon the continued potency of the earlier cases on this subject." (Emphasis added.)

---

[12]The Chinese Exclusion Case, (Chae Chan Ping v. U. S.), 130 U. S. 581, 9 S. Ct. 623, 32 L. Ed. 1068; Fong Yue Ting v. United States, 149 U. S. 698, 707, 13 S. Ct. 1016, 37 L. Ed. 905; The Japanese Immigration Case (Kaoru Yamataya v. Fisher), 189 U. S. 86, 100, 23 S. Ct. 611, 47 L. Ed. 721; Turner v. Williams, 194 U. S. 279, 289, 24 S. Ct. 719, 48 L. Ed. 979; Chuoco Tiaco v. Forbes, 228 U. S. 549, 556, 33 S. Ct. 585, 57 L. Ed. 960; U. S. *ex rel.* Vajtauer v. Comm'r of Immigration, 273 U. S. 103, 106, 47 S. Ct. 302, 71 L. Ed. 560.

II.

Sufficiency of the Evidence.

Appellant's contention with regard to sufficiency of the evidence is not borne out by the record and it must be remembered that the trial court made a specific finding, not only that there was some evidence which would be sufficient to sustain the administrative procedure, but found that there was "substantial" evidence to support the warrant of deportation [C. T. 14], and repeated the substantiality of the evidence in the conclusions of law [C. T. 50].

While appellant quotes at random from the certified record, when such quotations are considered in the light of the full transcripts of March 17, 1948, beginning on page 173 of the certified record, and of March 31, 1948, beginning on page 183 of the certified record, the ambiguity is dispelled. For example, the following dialog takes place, beginning on page 178 of the certified record:

> "Q. Who first induced you to join the Communist Party? A. Morgan Hull.
>
> Q. Is he an organizer for the Communist Party? A. I think he was. He got me to join about 1944. He did not ask me to join. He just asked me to go to some meetings.
>
> Q. Where did you attend these meetings? A. They are mostly held in different homes.
>
> Q. Prior to the time you were placed under oath, you testified that you first joined the Communist Party about 1944 you believe in the home of Bill Decker. A. I think it was in a bar some place. It wasn't in a home. It was in a little bar at 6th Street near Market. Bill Decker was just in there.

Q. What line of reasoning was given you as to reasons why you should join the Communist Party? A. I was told that it wasn't a party at that time; that it was a political association.

Q. What reason did they give you for wanting you to join the Party? A. They had no intention of overthrowing the Government or anything; they were just trying to improve the living conditions of the people, of the working class.

Q. Are you presently a member of the Communist Party? A. No, not any more.

Q. When did you leave the Party? A. About two years ago.

Q. Did you resign your membership in writing at that time or was it a verbal resignation? A. No, I just dropped out.

Q. Then you were a member of the Communist Party from approximately 1944 to 1946 when you dropped out. Is that correct? A. Yes.

Q. How many meetings did you attend during the time that you were a member? A. I did not attend very many meetings, about ten or twenty. They were held at 5th and F Streets. It was an office."

Then, on page 182:

"Q. Is there anything further that you care to say at this time? A. I realize that I made a mistake in joining the Communist Party. I don't want to be deported from the United States because of my wife and children. I can easy rejoin the Party and if it is possible in any way I would like the Government to show me leniency and take no action against me but allow me to rejoin the Party, if necessary, and to give information concerning the Party to the United States Government. I am a

member of the CIO Council also and I can furnish information on that."

Further testimony was given on March 31, 1948, and that testimony which appears on page 184 is of importance.

"Q. I desire to take additional information from you at this time concerning your knowledge of Communist literature which may have been distributed by the Communist Party during the time you were a member of that Party. Are you willing to give information in this regard? A. Yes, sir.

Q. During the period of your membership, did you have occasion to frequent any book stores which contained Communist literature? A. There was an International book store but I don't know the name of it at 6th and E run by two old ladies. I used to go there and read literature concerning labor. They also had many other pamphlets and magazines of the type you describe. I never read these but I saw them there. At that time I was Secretary-Treasurer of Local 64 and I was given literature to distribute or get rid of in any way I could—stuff they had laying around."

At page 185:

"Q. At the Communist meetings which you attended, is it not true that as a part of their meetings they promoted the sale and distribution of Communist literature? A. That's right.

Q. When you first attended these meetings who promoted this sale and distribution of literature at that time? A. There was a fellow by the name of Morgan Hull.

Q. Was this the same man that you have previously identified in your statement of March 17, 1948? A. That's right.

Q. Did Morgan Hull ever ask you to assist in the sale or distribution of this literature? A. I don't think so. He might have but I don't remember. You mean he would tell you to go and sell the stuff?

Q. Or ask you to buy it, give it away, or anything. A. He used to lecture on this stuff and put the books out for distribution and sale.

Q. Then he would inform the members of the Party at the meeting as to the contents of the pamphlets? A. That's right."

At the conclusion of this testimony, the appellant again offered to give information concerning the Communist Party to the Government if they wanted him to do so.

At this point, it would be wise to call the Court's attention to the regulations then in effect covering arrest and deportation of aliens, and the Court is referred to Title 8, Code of Federal Regulations, Section 150.1, which states in part as follows:

"§150.1. *Investigations*—(a) *Aliens reported, or believed, to be subject to deportation.* The case of every alien reported, or believed, to be subject to arrest and deportation, shall be thoroughly investigated by such officer as may be designated for that purpose.

(b) *Purpose.* The purpose of the investigation shall be to discover whether or not a *prima facie* case for deportation exists; that is, whether there is credible evidence reasonably establishing (1) that the person investigated is an alien, and (2) that he is subject to deportation.

(c) *Interrogation of aliens under investigation.* All statements secured from the alien or any other person during the investigation, which are to be used as evidence, shall be taken down in writing; and the

investigating officer shall ask the person interrogated to sign the statement. Whenever such a recorded statement is to be obtained from any person, the investigating officer shall identify himself to such person and the interrogation of that person shall be under oath or affirmation. Whenever a recorded statement is to be obtained from a person under investigation, he shall be warned that any statement made by him may be used as evidence in any subsequent proceeding. * * *"

The Court will note the compliance with the law by the examining officer at the beginning of the taking of each statement of March 17, 1948, on page 173 of the certified record, and of March 31, 1948, on page 183 of the certified record, wherein the examining officer states to the alien:

"Q. You are informed that I am a United States Immigrant Inspector and I now present to you my credentials (displays Form G-440 bearing photograph of examining officer). I am authorized by law to administer oaths and accept testimony in connection with the immigration and naturalization laws. I desire to take a statement from you at this time concerning your right to be and remain in the United States. Any statement you make should be voluntary, and you are hereby warned that anything you say might later be used against you or any other person in any proceedings which the Government may see fit to institute. You are further warned that any false statement knowingly made under oath constitutes the crime of perjury, the penalty for which is a fine of not more than $2,000 or imprisonment for not more than five years, or by both such fine and imprisonment. Do you understand?"

The statement on page 183 varies but little.

The above interrogation of an alien under investigation gave rise, then, to the issuance of a warrant of arrest, as provided for in 8 C. F. R. 150.3.

Reference to the hearings upon the warrant of arrest begun March 10, 1949, beginning at page 68 of the certified record, and continued to January 12, 1950, beginning at page 77 of the certified record, at which times the appellant was represented by counsel, are indicative of the temperament and state of mind of the alien.

Additional evidence, evidence that has not been refuted, was developed by the production of a witness in the hearing of January 12, 1950, at which time the appellant was represented by counsel, and for the most part refused to answer on constitutional grounds. The testimony is that of Government witness Jona Cooley Meza, and begins on page 110 of the certified record. Mrs. Meza places the appellant at closed meetings which were open only to Communists [C. T. 114, 115] and testifies further that the appellant held an office in the Spanish Speaking Club Unit of the Communist Party of the United States [C. T. 118], that the appellant was elected to the office of educational director at this time [C. T. 119]. The witness further testified to conversations with the appellant, wherein he told her when he joined the Communist Party and why he had joined it [C. T. 126].

It must be then concluded, as found by the District Court, that there was substantial evidence of appellant's membership in the Communist Party.

III.

Fairness of the Hearing.

The hearing of December 12, 1950, was a *de novo* hearing, the ruling of the Supreme Court in *Sung v. McGrath,* 339 U. S. 33, having vitiated the earlier hearings, and the action of Congress on September 27, 1950, exempting deportation proceedings from the applicable provisions of the Administrative Procedure Act, rendered further hearings necessary, in line with the then state of the law. On December 12, 1950, the appellant was again represented by counsel. Passage of the Internal Security Act above referred to had also intervened, and entirely in accord with the procedures outlined the more specific charge of membership in the Communist Party was lodged by the hearing officer.

Counsel for the appellant stipulated that the testimony which had previously been given in the case, together with the exhibits, might be entered of record and made a part of the present hearing and used in arriving at a decision in the case [C. T. 34]. This stipulation covered, among other things, the sworn statement made by appellant on March 17, 1948, and the supplemental sworn statement made by appellant on March 31, 1948 [C. T. 35].

There has been no unfairness in the long and studied hearings given to the appellant. He was represented by counsel at all times and counsel for appellant raises only speculation to base his allegation that they were not legally conducted according to law, contrary to the finding of the District Court.

Nowhere does appellant specifically point to unfairness in the hearing.

Any suggestion by the appellant that the deportation proceedings must be tested by principles of law applicable to criminal proceedings is without foundation. It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment.

Mahler v. Eby, 264 U. S. 32.

See also:

Zakonaite v. Wolf, 226 U. S. 272, and
Lapina v. Williams, 232 U. S. 78.

IV.

Scope of Inquiry.

The inquiry of the Court upon writ proceedings in deportation cases is limited, as established by a long line of decisions. If the hearing in deportation proceedings is fair, if there is evidence to support the finding of the Attorney General, and if no error of law is committed, the ruling of the Department must stand and cannot be corrected in judicial proceedings.

Kessler v. Stracker, 307 U. S. 22;
Bridges v. Wixon (9 Cir., 1944), 144 F. 2d 927;
Moncado v. Ramsey (8 Cir., 1948), 167 F. 2d 191;
Von Kleczkowski v. Watkins, 71 Fed. Supp. 429 (D. C. N. Y., 1947).

A particularly cogent statement of the scope of the inquiry of the Court in habeas corpus proceedings is set out in the Opinion of Mr. Justice Douglas, of the United States Supreme Court, in the case of *Eagles v. Samuels,* 329 U. S. 304 (1946), beginning at the bottom of page 311, in which the Court states:

"It is elementary that *habeas corpus* may not be used as a writ of error. *Tisi v. Tod,* 264 U. S. 131;

Woolsey v. Best, 299 U. S. 1. The function of *habeas corpus* is exhausted when it is ascertained that the agency under whose order the petitioner is being held had jurisdiction to act. If the writ is to issue, mere error in the proceeding which resulted in the detention is not sufficient. *Tisi v. Tod, supra.* Deprivation of petitioner of basic and fundamental procedural safeguards, an assertion of power to act beyond the authority granted the agency, and action without evidence to support its order, are familiar examples of the showing which is necessary. See *Johnson v. Zerbst,* 304 U. S. 458; *Bridges v. Wixon,* 326 U. S. 135, 149. But it is not enough to show that the decision was wrong, *Tisi v. Tod, supra,* or that incompetent evidence was admitted and considered. *Vajtauer v. Commissioner,* 273 U. S. 103. If it cannot be said that there were procedural irregularities of such a nature or magnitude as to render the hearing unfair, *Bridges v. Wixon, supra,* p. 156, or that there was no evidence to support the order, *Vajtauer v. Commissioner, supra,* the inquiry is at an end."

The Court further states, at page 315:

"* * * But as we have said, the range of inquiry in a *habeas corpus* proceeding is limited. We are not sitting in review of action of federal agencies over which we have the power of supervision. *Cf. McNabb v. United States,* 318 U. S. 332. The function of *habeas corpus* is not to correct a practice but only to ascertain whether the procedure complained of has resulted in an unlawful detention. It is the impact of the procedure on the person seeking the writ that is crucial. Whatever potentialities of abuse a particular procedure may have, the case is at an end if the challenged proceeding cannot be said to have been

> so corrupted as to have made it unfair. Samuels points to possibilities of abuse. But he fails to establish prejudice in his case."

The *Eagles* case also makes clear the fact that the burdent of proof in a habeas corpus proceeding is upon the petitioner and he must go forward to support the allegations of his petition.

The District Court found specifically on the points enumerated above within the scope of the inquiry [C. T. 14], and concluded as a matter of law that the Immigration and Naturalization Service that conducted the hearing of December 12, 1950, had jurisdiction to act, that the hearing was fair, that none of the constitutional rights of the appellant was abridged or violated, and that there was substantial evidence to support the order of deportation [C. T. 15].

Conclusion.

In conclusion, it might be wise to repeat the language of *Harisiades v. Shaughnessy, supra,* at page 591:

> "We think that, in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government's power of deportation. However desirable world-wide amelioration of the lot of aliens, we think it is peculiarly a subject for international diplomacy. It should not be initiated by judicial decision which can only deprive our own Government of a power of defense and reprisal without obtaining for American citizens abroad any reciprocal privileges or immunities. * * *"

Appellee, therefore, requests that the judgment of the District Court be affirmed.

Respectfully submitted,

WALTER S. BINNS,
United States Attorney,

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division,

ROBERT K. GREAN,
Assistant U. S. Attorney,

Attorneys for Appellee.